**NG CHEAH CHEONG**

**v.**

**ONG SING HOCK**

HIGH COURT MALAYA, TAIPING
VT SINGHAM J
[CIVIL APPEAL NO: 12-11-01]
15 JULY 2002

***CIVIL PROCEDURE:*** *Appeal - Notice of appeal - Whether copy of notice of appeal by the court served on respondent must be endorsed - Subordinate Courts Rules 1980, O. 49 r. 2(6)*

***DAMAGES:*** *Quantum - Variation of - Appeal against liability and quantum - Failure of trial judge to consider relevant evidence - Whether trial judge had erred*

***TORT:*** *Negligence - Road accident - Liability, assessment of - Whether trial judge had considered all vital and material evidence in apportioning liability - Whether there was misdirection - Whether appellate court had no alternative but to intervene*

This was an appeal by the appellant against the decision of the learned sessions court judge dismissing the appellant's claim for injuries resulting from a road accident between the appellant and the respondent. The appeal was against liability and quantum; the respondent, however, raised a preliminary objection that the appeal was not properly brought before this court, contending that the notice of appeal that was served on the respondent's solicitors was defective as it was not endorsed by the sessions court before it was served, as required under O. 49 r. 2(6) of the Subordinate Courts Rules 1980 ('SCR').

**Held:**

**[1]** In the face of the express provision in O. 49 r. 2(6) of the SCR which was crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If compliance with this requirement is insisted upon, it would surely be an usurpation of the legislative function and an extension to Parliamentary language, and this court would then be encroaching into the domain of the legislature and importing words into the rules of the court which have, in fact, statutory force.
(p 510 f-g)

**[2]** In respect of quantum, upon examination of both oral and documentary evidence in its totality, this court held that the learned sessions court judge's failure to consider the said evidence resulted in him falling into grave error and consequently depriving the appellant of his entitlement to damages for two injuries he had suffered consequent to the accident. (p 527 e-h)

**[3]** With regards to liability, the learned sessions court judge had erred in law and fact in dismissing the appellant's claim when he said that there were no police photographs tendered to support the appellant's claim as to how the accident occurred; the notes of evidence contained in the record of appeal show that the police photographs were tendered. As a result, this court had no alternative but to intervene and apportion liability on a 50:50 basis. (p 530 c-e)

*[Appeal against liability and quantum allowed.]*

**Case(s) referred to:**

*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283* ***(foll)***
*Brundt v. Great Boulder Proprietary Gold Mines [1948] Ch 145* ***(refd)***
*Chan Wai Tong & Anor v. Li Ping Sum [1985] 2 WLR 396* ***(refd)***
*Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127* ***(refd)***
*Chong Thain Vun v. Watson & Anor; Hamid Datun v. Majanggil & Anor; Richard E Yap v. Tun Datu Mustapha Datu Harun [1968] 1 MLJ 65* ***(refd)***
*Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285* ***(refd)***
*Crawford v. Spooner [1846] 6 Moore PC 1* ***(refd)***
*Dovey v. Cory [1901] AC 477* ***(refd)***
*Doyle v. Olby Ltd [1969] 2 QB 159* ***(refd)***
*Duport Steels Ltd v. Sirs [1980] 1 WLR 142* ***(refd)***
*EE Kim Kin v. Collector Of Land Revenue, Alor Gajah [1967] 2 MLJ 89* ***(refd)***
*Fothergill v. Monirch Airlines [1980] 3 WLR 209* ***(refd)***
*Garland v. Carlisle [1837] 7 ER 263* ***(refd)***
*Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 28 MLJ 370* ***(refd)***
*Harkness v. Bell's Asbestos And Engineering Ltd [1966] 2 QB 729* ***(refd)***
*Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd [2001] 4 CLJ 528* ***(not foll)***
*Idris Hj Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141* ***(refd)***
*Imtiaz Ahmad v. Ghulam PLD [1963] SC 382* ***(refd)***
*Ismail Abdul Hamid v. OSK & Partners Sdn Bhd [1997] 1 CLJ 583* ***(foll)***
*Kanan Subramaniam & Satu Lagi v. Aman Syah Abadzyuid [2002] 6 CLJ 34* ***(foll)***
*Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396* ***(refd)***
*Lee Choo Tai & Anor v. Tou Teng Chung [1989] 2 CLJ 384; [1989] 1 CLJ (Rep) 71* ***(dist)***
*Lee Guat Eng v. Tan Lean Kim [1985] 2 MLJ 196* ***(refd)***

*Lee Lan v. Lim Yoon Loy & Ors [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251* ***(dist)***
*Lim Cheng v. Sandanam [1962] 28 MLJ 254* ***(refd)***
*Loh Kooi Choon v. Government Of Malaysia [1977] 2 MLJ 187* ***(refd)***
*London Transport Executive v. Betts [1959] AC 213* ***(refd)***
*Magor And St Mellons Rural District Council v. Newport Corporation [1951] AC 189* ***(refd)***
*MBf Holdings Bhd v. Emtex Corporation Bhd [1986] 1 MLJ 477* ***(refd)***
*Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645* ***(foll)***
*Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 1 CLJ 301; [1984] 1 CLJ (Rep) 472* ***(foll)***
*Ogden Industries Pty Ltd v. Lucas [1969] 3 WLR 75* ***(refd)***
*Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319* ***(cit)***
*R Rama Chandran v. The Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147* ***(refd)***
*Re Coles And Ravenshear [1907] 1 KB 1* ***(refd)***
*Re Helsby, ex p The Trustee [1894] 1 QBD 742* ***(refd)***
*Re Mirams [1891] 1 QB 594* ***(refd)***
*Reg v. Barnet LBC Exp Shah [1983] WLR 16* ***(refd)***
*SA Andavan v. Registrar Of Titles, Negeri Sembilan & Ors [1977] 2 MLJ 220* ***(refd)***
*Sam Wun Hoong v. Kader Ibramshah [1981] 1 MLJ 295* ***(foll)***
*Sundralingam v. Ramanathan Chettiar [1967] 2 MLJ 211* ***(refd)***
*Sundram Ramasamy v. Arujunan Arumugam & Anor [1994] 4 CLJ 300* ***(foll)***
*Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682* ***(refd)***
*Tan Ting Kok v. Cheong Lep Keen & Anor [1969] 1 MLJ 153* ***(dist)***
*Tan Weng Chiang v. PP [1992] 1 CLJ 2094; [1992] 1 CLJ (Rep) 324* ***(refd)***
*Wong Lai Fatt v. PP [1973] 2 MLJ 31* ***(refd)***
*Woon Ngee Yew & Ors v. Ng Yoon Thai & Ors [1941] 10 MLJ (FMSR) 37* ***(foll)***

**Legislation referred to:**
Courts of Judicature Act 1964, ss. 17(1), (4), (5), 28(1)
Subordinate Courts Rules 1980, O. 26A, O. 49 rr. 1, 2(1), (2), (3), (6)

**Other source(s) referred to:**
*Craies on Statute Law*, 6th edn, p 71

*For the appellant - S Saktivel; M/s. Kula & Assocs*
*For the respondent - Corrine Teh Gaik Suan; M/s Othman Hashim & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**VT Singham J:**
This is an appeal against the decision of the sessions court, Taiping which had on 17 May 2001 dismissed the appellant's claim for damages for injuries arising out of a road accident which occurred on 2 November 1993 at 2 1/2

milestone, Jalan Simpang, Taiping involving his m/cycle No: ACH 9263 and m/cycle No: ACK 3525 which was ridden by the respondent. The appeal was against liability and quantum. The appellant in this case was the plaintiff, aged 23 years, a restaurant worker. He had filed an action by a summons dated 12 September 1994 at the sessions court, Taiping for general and special damages against the respondent.

**Preliminary Objection**

At the outset of the appeal which came up for hearing on 8 February 2002, the respondent's counsel Ms Corrine Teh Gaik Suan raised a point of law as a preliminary objection that the appeal is not properly brought before this court. This court will deal with that *in limine*. She contended that the notice of appeal dated 18 May 2001 which was served on her firm as solicitors for the respondent is defective as the copy which was served on her firm was not endorsed by the court, in this case by the sessions court, Taiping before it was served on them as required under O. 49 r. 2(6) of the Subordinate Courts Rules 1980. She submitted that the appellant's solicitors must serve a copy of the notice of appeal which was filed in court and returned to the appellant's solicitors by the court with the endorsement by the court of the date of filing and not just any copy of the notice of appeal as was done in this case.

At this stage, it would be convenient to set out the relevant provisions of O. 49 r. 1 and 2 of the Subordinate Courts Rules 1980 (hereinafter referred to as "the SCR 1980") for this appeal which is as follows:

Order 49 rr. 1 and 2

1. In this Order "decision" includes "judgment", "order" and "decree".

2. (1) Appeals to the High Court shall be brought by giving notice of appeal in Form 140. **A copy of such notice of appeal with the date filed endorsed thereon shall be sent by the Registrar to the Registrar of the High Court**. (emphasis added)

(2) An appellant may appeal from the whole or any part of a decision and the notice of appeal shall state whether the whole or part only, and what part, of the decision is complained of.

(3) **The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced**. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision. (emphasis added)

(4) As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.

(5) Within 14 days from the receipt of the notification, the appellant shall, unless the Court for sufficient cause otherwise orders:

(a) deposit in the Court appealed from a sum which in the opinion of the Registrar will cover the costs of preparing a sufficient number of copies of the appeal record for the use of the High Court and the parties to the appeal; and

(b) lodge in the Court appealed from a sum of two hundred and fifty ringgit, or such lesser sum as the Court may in any case direct, by way of security for the costs of the appeal.

(6) *The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors. It shall not be necessary to serve parties not so affected*. (emphasis added)

However, on being questioned by this court as to whether the particular rule in reference to the service of the notice of appeal on the respondent's solicitors provides for such a requirement that only an endorsed copy by the court of the notice of appeal must be served on the respondent's solicitors, the learned counsel for the respondent admirably conceded that the rule does not provide for such a requirement. Nevertheless, she argued that there is a decision of the High Court, Kota Bahru which has ruled that only a copy of the notice of appeal which is endorsed by the lower court could be effectively served on the respondent's solicitors. Based on that decision, she submitted that the appeal should be dismissed with costs. Learned counsel for the respondent referred to *Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd* [2001] 4 CLJ 528 in support of her argument. In that case, the appellant who was the defendant in respect of a summary judgment obtained by the respondent pursuant to O. 26A of the SCR 1980 appealed to the High Court against the decision of the sessions court. The respondent's counsel in that case however raised a preliminary objection at the High Court that the notice of appeal which was served by the appellant's solicitors on them was defective as the copy of the notice of appeal which was received by the respondent's solicitors was not endorsed by the court and by implication it was contended that it was never filed in court. His Lordship Suriyadi Halim Omar J in allowing the preliminary objection had dismissed the appeal with costs. His Lordship ruled that:

> To reiterate, the reason for my agreeing with the preliminary objection followed by the rejection of the impugned notice of appeal was not because it was served out of time, but on the premise of the failure of the defendant to serve the

plaintiff with a good notice of appeal. Even though the plaintiff had been supplied with a copy of the notice of appeal, the fact that it had not emanated from the court, a good notice of appeal could not have been said to have been served (*Tan Ting Kok v. Cheong Lep Keen & Anor* [1969] 1 MLJ 153). That being so no service had taken place.

> ... the only conclusion is that the "notice of appeal" to be served by the appellant must be a notice of appeal that had been filed and endorsed with a date of filing by the registrar (O. 49 r. 2(6) read together with r. 2(1).

His Lordship ruled that the notice of appeal which was served on the respondent's solicitors was flawed, hence the appeal was not competent.

For the sake of the importance of the preliminary objection which is concerned with the construction of O. 49 r. 2(3) and (6) of the SCR 1980, it would be convenient to once again state the particular sub-rule of O. 49 which is relevant for the preliminary objection in this appeal. Rule 2(3) and (6) of O. 49 of the SCR 1980 states as follows:

> r. 2(3) The notice of appeal shall be filed within 14 days from the day on which the decision was pronounced. The Court appealed from shall thereupon supply to the appellant, upon payment of the fee therefor a certified copy of the notes of evidence, a certified copy of the judgment, or, in case no written judgment has been delivered, of the grounds of decision.
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> (6) **The notice of appeal shall be served by the appellant within the time limited for the filing of appeal on all parties directly affected by the appeal or their respective solicitors**. It shall not be necessary to serve parties not so affected. (emphasis added)

On the other hand, Mr S Saktivel counsel for the appellant submitted that there is no requirement under r. 2(6) of O. 49 of the SCR 1980 for the appellant to serve an endorsed copy by the Court of the notice of appeal. He contended that the rule merely requires that the notice of appeal must be filed in court within 14 days from the date of the decision and that the notice of appeal must be served within the time limited for the filing of the notice of appeal. He contended that the rule did not require for an endorsed copy by the court of the notice of appeal to be served on the respondent. Learned counsel for the appellant submitted that a copy of the notice of appeal as required under r. 2(6) of O. 49 of the SCR 1980 has been served on the respondent's solicitors within the 14 days period. He submitted that the preliminary objection ought to be dismissed with costs and that this court should proceed to hear the appeal on the merits. He further submitted that in the instant appeal the appellant has complied with the two requirements as stipulated and in accordance with r. 2(3) and (6) of O. 49 of the SCR 1980 that is, the notice

of appeal was filed in court within 14 days from the date which the decision was delivered and the notice of appeal was served on the respondent's solicitors within the time limited for the filing of the notice of appeal. Accordingly, he submitted that the notice of appeal which was served on the respondent's solicitors was good and sufficient notice and that the purpose of the service of the notice of appeal was purely to give notice to the respondent's solicitors that an appeal has been filed against the decision of the sessions court. He finally submitted that the appeal is properly before this court and urged this court to proceed with the appeal and dismiss the preliminary objection with costs.

**Object Of Serving Notice Of Appeal On Respondent**

This court is of the view that the whole purpose of serving a copy of the notice of appeal on the opponent or the respondent or on all parties directly affected by the appeal within the time frame limited to file an appeal under the rules is to give early notice to the parties that the appellant is dissatisfied with the decision of the court and that he wishes to appeal to the High Court. By this early notice there will be no room for surprises, delays and prejudice caused to any party directly affected by the appeal. The legislature and the rules committee have in their own wisdom did not require for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors and that it only required service of the notice of appeal and that it be served within the time limited to file the appeal, being, within 14 days from the date on which the decision was pronounced by the lower court.

This court is of the view that in the face of this express provision in r. 2(6) of O. 49 of the SCR 1980 which is crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be an usurpation of the legislative function and an extension to the Parliamentary language and this court would then be encroaching into the domain of the legislature and importing words into the rules of the court which have infact statutory force (see s. 17(4) and (5) of the Courts of Judicature Act 1964). This court is reminded that the function of this court is "interpretation, not legislation."

Wan Yahya FCJ in *R Rama Chandran v. The Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147 said:

> ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. *Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves*

> *consider that the consequences of doing so would be inexpedient, or even unjust or immoral*. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution, it is Parliament's opinion on these matters that is paramount." (emphasis added)

In *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319) at p. 59 (p. 325), His Lordship Edgar Joseph Jr J said the rules of the court are subsidiary legislation and have statutory force where His Lordship said:

> I might add, in passing, that I do not consider that there is any substance in the submission that O. 92 r. (4) of the Rules of the High Court is purely a rule of practice. The Rules of the High Court were enacted in exercise of the powers conferred by s.17 of the Courts of Judicature Act, 1964, with the consent of the Chief Justices of Malaya and Borneo and the rules committee and are comprised in P.U.(A) 50 which is clearly subsidiary legislation within the meaning of section 3 of the Interpretation Act, 1967. **The Rules in my opinion, therefore, have statutory force** and are not mere rules of practice. In the result, I hold that there is jurisdiction by virtue of inherent powers to grant **Mareva** injunctions in this country. (emphasis added)

The rules committee which are given the powers pursuant to s. 17(1) of the Courts of Judicature Act 1964 to provide 'rules of court' in order to regulate and prescribe the practice and procedure including the method of pleadings and the practice to be followed in the respective courts in its own wisdom have provided the mode and time frame for filing the notice of appeal and the service thereon on all parties directly affected by the appeal or their respective solicitors and it would be unwise for this court to enlarge the rules which is primarily and solely the function of the legislature and the rules committee. Consequently, it is not the function of this court to include words to the rules of the court. If the preliminary objection as raised by the respondent's counsel is upheld it would amount to a complete denial of a party's right of appeal to the High Court as provided under O. 49 r. 2(2) of the SCR 1980 and subject to the restriction contained in s. 28(1) of the Courts of Judicature Act 1964.

As for the interpretation of the rules which have statutory force, His Lordship Mohamed Azmi SCJ in *Tan Weng Chiang v. PP* [1992] 1 CLJ 2094; [1992] 1 CLJ (Rep) 324 said:

> Where the meaning of words in the statute is plain and unambiguous, judges should not invent fancy ambiguities (see *Duport Steels Ltd & Ors. v Sirs & Ors* [1980] 1 W.L.R. 142)

His Lordship Seah SCJ in his dissenting judgment in *MBf Holdings Bhd v. Emtex Corporation Bhd* [1986] 1 MLJ 477 at 485 said:

> It is a well-recognized canon of construction that a court has no power to fill any gaps disclosed in the Act. To do so would be to usurp the function of the legislature.

In *Dovey v. Cory* [1901] AC 477 at p. 488 Lord Macnaghten said:

> I do not think it **desirable for any tribunal to do that which Parliament has abstained from doing** – that is to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and speaking for myself, I rather doubt the wisdom of attempting to do more. (emphasis added)

Lord Diplock in *Duport Steels Ltd v. Sirs* [1980] 1 WLR 142 said at p. 157:

> ... It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the Court before whom the matter comes consider to injurious to the public interest.

In *Fothergill v. Monirch Airlines* [1980] 3 WLR 209 at p. 221 Lord Diplock said:

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining "the intention of Parliament"; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was

anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.

Lord Denning in *London Transport Executive v. Betts* [1959] AC 213 at p. 247 said:

> **The judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do so**; see *Magor and St. Mellons Rural District Council v. Newport Corporation.* No court is entitled to substitute its words of the Act (see *Goodrich v. Paisner*). (emphasis added)
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> ... the business of the courts is to see what Parliament had said, instead of reading into an Act what ought to have been said (per Lord Coleridge C.J. in *R. v. Mansel Jones* [1889] 23 Q.B.D. 29 at p. 32.

In *Crawford v. Spooner* [1846] 6 Moore PC 1 at p. 9:

> We cannot aid the legislature's defective phrasing of an Act, **we cannot add and mend, and, by construction, make up deficiencies which are left there**. (emphasis added)

In the meantime, this court took the liberty to look at the appeal procedure from the lower court to the High Court provided in the repealed Subordinate Courts Rules 1950 which was the rules of the Subordinate Courts prior to the new Subordinate Courts Rules 1980 which came into force on 1 April 1981 for the purpose of comparison with the present SCR. Even under the old rules, there was no requirement to serve an endorsed copy by the court of the notice of appeal on all parties directly affected by the appeal or their respective solicitors. The only additional or new requirement which is included in r. 2(1) of O. 49 of the SCR 1980 is for the registrar of the lower court to send a copy of the notice of appeal with the date filed endorsed thereon to the registrar of the High Court. There is no requirement for the registrar of the lower court to send a copy of the notice of appeal to the appellant's solicitors with the date filed endorsed on the notice of appeal.

Even assuming for the purpose of argument that there is such a requirement for the appellant to serve an endorsed copy of the notice of appeal on the respondent's solicitors and within the 14 days period under r. 2(6), it still cannot possibly be complied as the lower court in the instant appeal has not returned an endorsed copy of the notice of appeal to the appellant's solicitors. In this respect, counsel for the appellant said from the bar table that the lower court did not return a copy of the notice of appeal which was filed at the sessions court, Taiping with the endorsement of the date of filing and signed by the registrar. In response, learned counsel for the respondent was candid

when she said that she could not confirm if a copy of the notice of appeal with the endorsement was indeed returned by the sessions court to the appellant's solicitors.

Nevertheless, learned counsel for the respondent contended that in such a situation where a copy of the notice of appeal is not returned by the court to the appellant's solicitors, the appellant could formally apply for an extension of time to serve an endorsed copy of the notice of appeal on the respondent's solicitors outside the 14 days period after it is received by the appellant's solicitors from the court. This court is unable to appreciate this argument because, firstly, there is no express requirement in the rules at all for the lower court to return an endorsed copy of the notice of appeal to the appellant's solicitors and secondly, the requirement provided in r. 2(1) of O. 49 of the SCR 1980 is for the registrar of the lower court to send a copy of the notice of appeal with the date filed and endorsed thereon to the registrar of the High Court. If at all there was such an obligation on the part of the registrar of the lower court to send a copy of the notice of appeal with the date of filing endorsed in the notice of appeal to the appellant's solicitors, it would have been expressly included in the rules. Similarly, the obligation on the part of the appellant or his solicitors to serve a copy of the notice of appeal with the date of filing endorsed by the registrar of the lower court as contended by counsel for the respondent would have also been expressly included in the rules but none of these two requirements, namely, for the registrar of the lower court to send a copy of the notice of appeal with the date of filing endorsed on the notice of appeal to the appellant's solicitors and for the appellant's solicitors to serve a copy of the notice of appeal with the date of filing endorsed by the registrar of the lower court on the respondent or his solicitors exist. Further, it will not be the fault of the appellant or his solicitors if the endorsed copy of the notice of appeal had not been returned by the registry of the lower court to the appellant's solicitors within a reasonable time and within the 14 days so as to enable the appellant's solicitors to serve on the respondent's solicitors within the 14 days period. In any event, why should the appellant or his solicitors be placed with this burden or predicament when they have complied with the express requirement in r. 2(6) of O. 49 of the SCR 1980. Indeed, interpretation of the rules of the court should be made clear and be consistent so that parties, litigants and lawyers who come to court may act with certainty and lawyers will be able to advise their clients accordingly and not be in a state of indecision of any legal uncertainty.

In *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682, Haji Abdul Hamid Hj Omar LP observed in construing statutory provision that:

> To hold otherwise would mean that the court is creating law to provide for something clearly the legislature has no intention to do. We feel that our legislature has enacted exhaustively and exclusively.

In *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 at 292, His Lordship Edgar Joseph Junior J FCJ in delivering the judgment of the Federal Court comprising a panel of five judges presided by the Chief Justice of Malaysia said:

> It is right to say at the risk of being trite, that in interpreting a statute, what the Court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v. The Queen* [1972] 127 CLR 291 at 296 Barwick CJ said: "In construing the section we are seeking Parliament's intention." Similarly, in *Attorney-General (Canada) v. Hallet & Carey Ltd.* [1952] AC 427 at 499, Lord Radcliffe said: … every statute is to be expounded according to its manifest or expressed intention.

It is important to observe that practical difficulties may arise as a consequence if there is insistence for an appellant to serve an endorsed copy of the notice of appeal on the respondent. Assuming that and if the notice of appeal is filed on the 14th day after the decision of the lower court is delivered which the appellant is legally entitled to, how is the appellant to serve the endorsed copy by the court on the respondent within the 14 days period limited to file the notice of appeal as the court may not be able to return within the said time frame a copy of the notice of appeal with the endorsement of the date of filing to a solicitor who is in a distant town or state so as to enable the appellant's solicitors to serve the endorsed copy of the notice of appeal on the respondent. On the other hand, what is the position if the notice of appeal is filed on the date of the decision or even the next day and the court does not return a copy of the notice of appeal with the date of filing endorsed on the notice of appeal to the appellant's solicitors very much before the 14 days period so as to enable the appellant's solicitors to effect service of the notice of appeal with the endorsement by the court on the respondent or his solicitors.

Generally speaking, some lower courts have never returned and do not return to the appellant's solicitors a copy of the notice of appeal which has been filed in court with the endorsement of the date of filing either within the 14 days or even after the said period probably because the rules does not require the lower court to return the same to the appellant's solicitors. In those circumstances, how does one expect the appellant to serve an endorsed copy of the notice of appeal by the court on the respondent and within the time frame of 14 days. Does not the contention of the learned counsel for the respondent lead to absurdities and contrary to settled practice which has existed in our courts since the Subordinate Courts Rules 1980 came into force on

1 April 1981 that service of a copy of the notice of appeal on the respondent would suffice.

In this connection, it is the view of this court that until and unless the rules require expressly for an endorsed copy by the court of the notice of appeal to be served on the respondent or his solicitors after having envisaged all this practical problems, this court should not ordinarily interfere with parliamentary language except perhaps in cases where it is demanded in the interest of public justice and that must be exercised rarely. In fact, by asking the appellant's solicitors to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors, will it not give rise to an absurd and unjust situation and result in uncertainty in the administration of justice? This court is of the view that to interpret the rules otherwise would be to place an unnecessary burden on the appellant who would be at the mercy of the respondent and the court so as to seek for extension of time to serve an endorsed copy by the court of the notice of appeal on the respondent where the rule itself does not provide for such a requirement.

In *Magor And St Mellons Rural District Council v. Newport Corporation* [1951] AC 189 at 191 Lord Simons observed:

> The duty of the Court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited.

Lord Morton of Henryton in *Magor And St Mellons Rural District Council v. Newport Corporation* [1951] AC 189 at 192 observed:

> It is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.

Where the language is explicit, its consequences are for parliament and not for the courts, to consider. In such a case the suffering citizen must appeal for relief to the low-giver and not to the lawyer (per Coleridge J in *Garland v. Carlisle* [1837] 7 ER 263 at p 268).

In *Brundt v. Great Boulder Proprietary Gold Mines* [1948] Ch 145 at p. 159 Lord Greene MR said:

> Although the absurdity or the non-absurdity of one conclusion as compared with another may be of assistance and very often is of assistance to the court in choosing between two possible meanings of ambiguous words, it is a doctrine which has to be applied with great care, remembering that judges may be fallible on the question of an absurdity and in any event must not be applied

> so as to result in twisting language into a meaning which it cannot bear: it is a doctrine which must not be relied upon and must not be used to re-write the language in a way different from that which it was originally framed.

Therefore, if this court were to readily accept the contention of the learned counsel for the respondent, would it then not be asking this court to imply or import into r. 2(6) O. 49 of the SCR 1980, a further condition which the legislature or the rules committee did not do so. It is quite appropriate to state at this stage that in judicial law-making the courts should not usurp the function of the legislature or even for that matter the function of the rules committee which is chaired by the Rt Honourable Chief Justice of Malaysia as it might provoke the independent "relationship between the legislature and the judiciary in the law-making process." Further, the suggested new rule as contended by the respondent's counsel would have, either or by implication, to contradict the existing rule on the service of the notice of appeal. If the existing rule is to be changed to suit the argument of the respondent's counsel, it would again be a matter for Parliament and the rules committee.

In *Reg v. Barnet LBC Exp Shah* [1983] WLR 16 at 30, Lord Scarman observed:

> The way in which they used policy was, in my judgment, an impermissible approach to the interpretation of statutory language. Judges may not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy. But that is not this case.

In *Loh Kooi Choon v. Government Of Malaysia* [1977] 2 MLJ 187 at p. 188, His Lordship Raja Azlan Shah FJ (as His Highness then was) observed:

> The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord MacNaghten in *Vacher & Sons Ltd. v. London Society of Compositors*:
>
> > Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. *But a judicial tribunal has nothing to do with the policy of any Act which it may called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with*

> *the settled rules of construction*. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature. (emphasis added)
>
> It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction" – per Roskill LJ in *Henry v. Geopresco International Ltd*. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

In *Lee Lan v. Lim Yoon Loy & Ors* [1991] 3 CLJ 2393; [1991] 1 CLJ (Rep) 251 which is referred in *Himat Iktisas (M) Sdn Bhd*, the Supreme Court with respect did not state that a copy of the notice of appeal which is required to be served on the respondent has to be an endorsed copy by the court showing the date on which it was filed in court. His Lordship Harun Mahmod Hashim SCJ in that case had merely stated that the correct procedure to be followed in respect of appeals to the High Court is that firstly, the appellant must file the notice of appeal in the court appealed from within 14 days from date of decision and secondly, the appellant must serve a copy of the notice of appeal showing the date on which it was filed in court on the respondent or his solicitors which should also be done within 14 days from the date of the decision which is the time period permitted to file the notice of appeal in the registry of the subordinate court. Following the observation of His Lordship Harun Mahmod Hashim SCJ, it is expressly clear that there is no requirement for the appellant to serve an endorsed copy by the court showing the date on which it was filed in court and that decision does not lend support to the contention of the respondent's counsel that only an endorsed copy by the court must be served on the respondent's solicitors for the appeal to be properly brought before this court.

In any event, this court is of the respectful view and without speculating on the rational behind the observation by the Supreme Court in *Lee Lan*, ie, for the appellant to state on the copy of the notice of appeal which is intended to be served on the respondent's solicitors showing the date on which it was filed in court must have been merely to notify the respondent's solicitors that the notice of appeal has infact been filed in court within the 14 days period from the date on which the decision was pronounced. This no doubt is good practise so as to put the respondent on notice that the notice of appeal has been filed within the time limited for filing of appeal and the appeal is properly before the High Court. On the other hand, to insist that the notice of appeal which was served on the respondent's solicitors was defective and that the appeal is not properly before the High Court because the notice of

appeal which was served on the respondent's solicitors does not show the date on which it was filed in court is going too far and interfering with the well established practise carried on for many years by lawyers in this jurisdiction.

However, it is important to observe that in practise the requirement to state on the copy of the notice of appeal which is intended to be served on the respondent's solicitors who is in a distant town or state showing the date on which it was filed in court is not usually observed because a copy of the notice of appeal is basically served on the respondent's solicitors by a carbon copy of the covering letter of the firm of the appellant's solicitors which is addressed to the registrar/magistrate/sessions court judge where the notice of appeal is enclosed for filing with the necessary filing fees. In such a situation, there is really no necessity to state on the copy of the notice of appeal which is served on the respondent's solicitors showing the date on which it was filed in court as the covering letter which is addressed to the court with a carbon copy of the said letter enclosing a copy of the notice of appeal will show the date and that it is being served on the respondent's solicitors at the time of filing in court so long as it is done within the 14 days period.

On the other hand, this court wishes to stress at this stage that merely sending or posting copies of the notice of appeal for filing with the covering letter of the firm of solicitors of the appellant need not necessarily mean or refer to the date of filing the notice of appeal in court because the filing of the notice of appeal in court will be the date only when the court actually receives the notice of appeal and not on the date when it is posted. The date of posting or the date which is entered in the despatch book of the appellant's solicitors firm cannot be the date of filing in court as in some cases the notice of appeal is not despatched even to the local courts on the same date it is recorded in the despatch book but on the following day and according to the convenience or at the leisure of the despatch clerk due to lack of proper supervision or follow-up by some solicitors firm.

In the circumstances, this court with respect is unable to follow the ruling in *Himat Iktisas (M) Sdn Bhd* that a copy of the notice of appeal which is served on the respondent's solicitors must be an endorsed copy by the court. Further, the cases referred to in *Himat Iktisas (M) Sdn Bhd* in respect of the service of a copy of the notice of appeal, namely, *Gurbachan Singh v. Seagrott & Campbell (No 2)* [1962] 28 MLJ 370 and *Tan Ting Kok v. Cheong Lep Keen & Anor* [1969] 1 MLJ 153 are under the repealed rules of the Supreme Court 1957 and the repealed Federal Court (Civil Appeals) Appeals (Transitional) Rules 1963 which requires the notice of appeal to be served on all parties directly affected by the Appeal ie, "at the time of filing the notice of appeal" and "at the same time the notice of appeal is filed in court" respectively and has no relevance to the point of law raised in the instant appeal.

**Decision Of A Court Of Co-Ordinate Jurisdiction**

However, it is quite relevant to observe that this court is bound to accept the decisions of the higher courts to be in line with the hierarchical system of courts which exists in this jurisdiction and to be in line with the principle of stare decisis. On the other hand, this court with respect is not bound and has the freedom to depart from a decision of a court of co-ordinate jurisdiction although "judicial courtesy" requires that judges do not dissent from the views of their brethren. In *Sundralingam v. Ramanathan Chettiar* [1967] 2 MLJ 211 at 213, His Lordship HT Ong FJ (as he then was) said:

> Each court, of course, is bound by the decisions of courts above it, but **"individual judges are not bound by each other's decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren"**: see *Law in the Making* (6th Ed.) p.231. I do not think I can usefully add anything to what Sir Carleton Allen said, except to point out that, within the past decade and even the last lustrum, judges in Malaya have, on several occasions respectfully agreed to differ, as may be seen from the reports in The Malayan Law Journal. (emphasis added)

In *Ogden Industries Pty Ltd v. Lucas* [1969] 3 WLR 75 at p. 85 said:

> They desire to reiterate however what has so often been said before that in a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
>
> These general principles are particularly important when questions of construction of statutes are in issue.
>
> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than that found in the words of the Act itself.
>
> No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment. It is with these principles in mind that their Lordships approach this very considerable body of authority.

Since there is no requirement for the appellant or his solicitors to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors, the appellant who has statutory right to appeal against the decision of the lower court and subject to s. 28(1) of the Courts of Judicature Act 1964, he ought not to be deprived of an advantage granted to him by the rules, "unless there has been on his part some conduct raising an equity against him ...". Section 28(1) of the Courts of Judicature Act 1964 reads as follows:

> 28. Civil appeals from subordinate courts.
>
> 1. Subject to any other written law, no appeal shall lie to the High Court from a decision of a subordinate court in any civil cause or matter where the amount in dispute or the value of the subject-matter is ten thousand ringgit or less except on a question of law.

This court cannot accept that merely failing to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors which in any event is not required by the rules can deprive a litigant in this case the appellant of his statutory right of appeal to the High Court. It is the fundamental right granted to an aggrieved party to take his grievance against the decision of the lower court to the High Court by way of an appeal which is basically a continuity of the hearing in the lower court by way of re-hearing an appeal in the High Court and the respondent cannot put hurdles against the appellant by way of trivial and technical objections.

**Appeal Not To Be Decided On Technical Objection**

It is the view of this court that the High Court sitting in an appellate capacity should be more concerned with the merits of the case and re-hear the whole case and not simply decide the appeal on trivial and technical objections raised by way of preliminary objection with a view to shut out the appellant. In *R Rama Chandran v. The Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147, His Lordship Edgar Joseph Jr FCJ at p. 177 said:

> Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. **Thus, appellate jurisdiction is concerned with the merits of a case**. (emphasis added)

In *Re Helsby, Ex parte, The Trustee* [1894] 1 QBD 742 Lord Halsbury said at p. 744 "no doubt, as a general rule, if there is a real question to be argued, it is better than it should be argued then the appeal should be disposed off upon a technical objection."

In *Re Coles And Ravenshear* [1907] 1 KB 1 Collins SMR said:

> Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.

In *Lim Cheng v. Sandanam* [1962] 28 MLJ 254, the respondent's counsel raised a preliminary objection that the appeal record did not include "the decision" under the repealed of the Subordinate Courts Rules 1950 and the appeal record was not complete and therefore the appeal record should be dismissed. He further contended that the appeal should be dismissed on another ground, namely, that the decision given by the lower Court was not extracted by the appellant. His Lordship Hashim J said that "this is a matter of procedure and the appeal should not be dismissed for a technical flaw in the procedure".

In *Imtiaz Ahmad v. Ghulam PLD* [1963] SC 382 at p. 400, Kaikaus J said:

> I think the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities have to be avoided unless it be essential to comply with them on grounds of public policy. The English system of administration of justice on which our own is based may be to a certain extent technical but we are not to take from that system its defects. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

In *Harkness v. Bell's Asbestos And Engineering Ltd* [1966] 2 QB 729 at 735, Lord Denning MR observed that:

> Every omission or mistake in practice or procedure is hence forward to be regarded as an irregularity which the Court can and should rectify so long as it can do so without injustice. It can at last be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.

In *EE Kim Kin v. Collector Of Land Revenue, Alor Gajah* [1967] 2 MLJ 89, His Lordship Ismail Khan J (as he then was) said "Rules of procedure should be the hand maiden and not the master."

In *Wong Lai Fatt v. PP* [1973] 2 MLJ 31 at p. 33, His Lordship HT Ong CJ observed that "the paramount function and duty of the courts is to see that justice is done in all cases."

In *SA Andavan v. Registrar Of Titles, Negeri Sembilan & Ors* [1977] 2 MLJ 220 at 225, His Lordship Ajaib Singh J (as he then was) observed:

> Litigation is governed by rules of procedure and no side may take undue advantage over another by side-stepping any rule and it is the duty of the court to ensure that the parties engage themselves in a fair contest.

In *Idris Hj Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141 at 143, His Lordship Syed Agil Barakbah J (as His Lordship then was) said:

> The courts in a case ... prefer that it be decided on merits and do not invoke procedural rules to prevent a defendant from defending an action unless it has no merits in his application.

In *Lee Guat Eng v. Tan Lean Kim* [1985] 2 MLJ 196, His Lordship Hashim A. Yeop Sani SCJ (as he then was) said "the rule should not be used to shut out litigant in every case of non compliance."

In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 at 293, His Lordship Gopal Sri Ram JCA in delivering the judgment of the Federal Court said:

> That the justice of the case should be the overriding consideration is axiomatic. After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case. **And rules of Court and of practice are created to facilitate the attainment of justice, not is obstruction**. (emphasis added)

In *Ismail Abdul Hamid v. OSK & Partners Sdn Bhd* [1997] 1 CLJ 583, His Lordship Gopal Sri Ram JCA said:

> I am conscious of the injustice that may have been visited upon litigants by reason of the difference in judicial opinion in that appeals have been dismissed in limine. The ends of justice will be best served in such cases by the appropriate Courts entertaining applications to set aside the earlier dismissal and to have the appeals restored to the list. In cases where the notice of appeal has already been filed erroneously in the High Court, that Court should treat the non-observance of the rule as an irregularity and proceed to hear and dispose such appeals on merits in order to ensure that substantial justice is done. I would, in this context, recall to mind that, **"a rule of Court should not be given an interpretation that would result in unfairness or produce a manifest injustice**": *Sim Seoh Beng & Anor. V Koperasi Tunas Muda Sungei Ara Bhd* [1995] 1 CLJ 491 at p. 495; [1995] 1 MLJ 292 at p. 296. (emphasis added)

In the recent case *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 at pp. 693-694, His Lordship Mohtar Bin Abdullah FCJ observed that:

> ... a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law ... .

> The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the court is seised of jurisdiction over the case. So seised, the Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

Infact and for the sake of completion this court wishes to observe that recently the Rules of the High Court 1980 have also been amended to be cited as the Rules of the High Court (Amendment) 2002 which basically prevents preliminary objections on technicalities or on grounds of non-compliance of the rules unless "such non-compliance has occasioned a substantial miscarriage of justice."

New Order 1A of the Rules of the High Court (Amendment) 2002 states:-

COURT OR JUDGE SHALL HAVE REGARD TO JUSTICE

> In administering any of the rule herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non compliance of any of the rule herein.

Amendment to Order 2

PRELIMINARY OBJECTION FOR NON-COMPLIANCE OF RULES NOT ALLOWED (O. 2 r. 3)

> 3. A court or judge shall not allow any preliminary objection for any party to any cause or matter or proceedings only on the ground of non-compliance of any of the Rule unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

However, this court wishes to make it clear that the Rules of the High Court (Amendment) 2002 was not considered or applied to decide the preliminary objection raised by the respondent's counsel in the instant appeal as when the decision to dismiss the preliminary objection was made, the amended rules were not in existence and it came into force only on 16 May 2002.

This court is of the view that the appellant did not breach any of the rules as provided under O. 49 r. 1 and r. 2 of the SCR 1980 in so far as the service of the notice of appeal on the respondent's solicitors as a copy of the notice of appeal which was filed in court was infact served on the respondent's solicitors. The rule did not require the appellant to serve an endorsed copy by the court of the notice of appeal on the respondent's solicitors. Therefore it is not the function of this court to rewrite the rules to suit the arguments of the respondent's counsel or to give any extended meaning to the plain and

unambiguous words in r. 2(3) and (6) of O. 49 of the SCR 1980. It is only appropriate at this stage to state that a lawyer is only under an obligation to comply or observe the Rules as expressly stated in the rules of the court, in the instant appeal, the SCR 1980 and is not under any obligation or answerable for any extended construction of the Rules as this may have "disastrous consequences". However, in the event, there is a difference of judicial opinion on the construction of the rule by courts of co-ordinate jurisdiction, it is the considered view of this court that an appellant should not be made to suffer if a lawyer has not complied with the requirement of the rule so long as there is no prejudice or injustice to the respondent or the parties directly affected by the appeal (see *Doyle v. Olby Ltd* [1969] 2 QB 159 at 166, see *Cheow Chew Khoon (T/a Cathay Hotel) v. Abdul Johari Abdul Rahman* [1995] 4 CLJ 127, see *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 at 402).

In *Chong Thain Vun v. Watson & Anor; Hamid Datun v. Majanggil & Anor; Richard E Yap v. Tun Datu Mustapha Datu Harun* [1968] 1 MLJ 65, His Lordship Lee Hun Hoe J (as he then was) said:

> It would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases. **If there is any defect in the rule and amendment is necessary the remedy lies with the legislature. The court should not assume the function of the legislature by filling in omission which may be deliberate**.
> (emphasis added)

**Discretion**

This court is of the view that wherever a discretion is given to the court, that discretion should be exercised judicially so that it would produce a just result without causing injustice to the parties before the court by just dismissing an appeal on mere technicalities flaw in the procedure which there is none in the instant appeal. This court is not willing to shut out the appellant whose only permissible challenge against the decision of the lower court is by way of an appeal to the High Court merely on procedural technicalities which does not even exist on the facts in this appeal. This court therefore should not make decisions which are unjust to the litigants as the function of this court is to remedy an injustice whenever it is brought to its attention and not to result in injustice to litigants. Judicial power and discretion which the legislature and the rules committee have provided must be exercised with utmost care so that it would produce a just result and not injustice to litigants.

This court is bound by the rules of the court and so are litigants and lawyers who are expected to observe and comply what the rules require and not what a party requires his or her opponent to comply. Courts do not have the power

to change the rules even in cases where there is a need to suit practical inconveniences as that is the sole duty of Parliament or the rules committee. If Parliament or the rules committee in its wisdom employs a certain language and if the language is crystal clear as in r. 2(6) of O. 49 of the SCR 1980 in the instant appeal, it is not the function of this court to create uncertainty and inconsistencies to the whole scheme of the rules. It is the view of this court that sub-r. 6 means exactly what it says, that is, an appellant is required to serve a copy of the notice of appeal which he has filed in court and that the service is to be done within the time limited for the filing of the appeal which is 14 days from the day on which the decision was pronounced. There is no requirement for the appellant or his solicitors to serve on the respondent or his solicitors an endorsed copy by the court of the notice of appeal. If Parliament or the rules committee had intended that an endorsed copy by the court in the notice of appeal should be served on the respondent or all the parties affected by the appeal, it should be so expressed in the clearest possible language. This court is unable to find any such requirement. Cave J in *Re Mirams* [1891] 1 QB 594 at 595 observed: "Judges are more to be trusted as interpreters of the law then as expounders of what is called 'public policy'."

In *Craies on Statute Law*, 6th edn, p. 71 states that:

> In other words, the language of Acts of Parliament, and more especially of modern Acts must neither be extended beyond its natural and proper limit, in order to supply omissions of defects nor strained to meet the justice of an individual case.

In conclusion, the crux of the preliminary objection is whether the appellant ought to serve a notice of appeal which is endorsed by the court with the date of filing or just a copy of the notice of appeal filed in court. It is the considered view of this court that sub-r. 2(6) of O. 49 of the SCR 1980 does not require the appellant to serve an endorsed copy by the court of the date of filing as a service of the copy of the notice of appeal which is filed in court is good service of the notice of appeal.

In the circumstances, the preliminary objection raised by the respondent's counsel is dismissed. This court rules that the service of the notice of appeal on the respondent's solicitors was good service and that there was a proper appeal before this court and accordingly directed the appellant's counsel to proceed with the appeal on the merits and the respondent's counsel to submit or reply on the merits.

However, the respondent's counsel sought an adjournment on the ground that counsel En Mohd Rohan Bin Mohd Razi who is in charge of the appeal was on medical leave. The appeal was adjourned and fixed for hearing on 21 March 2002 and finally disposed off on the merits on 3 April 2002.

**Appeal On The Merits (Quantum)**

In respect of quantum, the appellant's counsel complained that the learned sessions court judge did not allow damages for two injuries, namely, 'fracture of olecranon and avulsion fracture of the lateral humeral epicondyle' because he found the two injuries were not included in the first medical report dated 8 January 1994 issued by Hospital Taiping where the plaintiff was first admitted into this hospital on 2 November 1993. The plaintiff was discharged on 8 November 1993 and immediately transferred to Hospital Ipoh on the same day on 8 November 1993 for further management. However, the medical report from Hospital Ipoh dated 19 May 1994 contained the two injuries based on the X-ray. The sessions court judge did not make any award for the two injuries as it was opposed by the respondent's counsel on the ground that it was not related to the accident and was not stated in the first medical report dated 8 January 1993 issued by Hospital Taiping. The learned Sessions court judge upheld the submission and made a finding that the plaintiff had failed to prove the two injuries on a balance of probabilities whether the fractures were as a result of this accident

On examining the evidence both oral and documentary in its totality, this court is of the view that the learned sessions court judge was unduly influenced by the submission of the learned counsel for the respondent and without giving any consideration to the fact that the plaintiff was transferred from Hospital Taiping to Hospital Ipoh by Hospital Taiping on the same day upon his discharge from Hospital Taiping. The doctor who issued the medical report dated 19 April 1994 therefore could not have fabricated the two injuries. Similarly, there was no room for the plaintiff to concoct or self induce the two injuries. The injuries as contained in the medical report issued by Hospital Taiping was basically on diagnosis and without an X-ray examination whereas the injuries as contained in the medical report issued by Hospital Ipoh was as a result of an X-ray. Had the learned sessions court judge considered these factors without just relying on the bare submission of counsel for the respondent, he would not have fallen into this grave error and deprived the appellant of his entitlement for damages for the injuries he had sustained consequent to the accident (see majority decision in *Sundram Ramasamy v. Arujunan Arumugam & Anor* [1994] 4 CLJ 300). (See *Lee Choo Tai & Anor v. Tou Teng Chung* [1989] 2 CLJ 384; [1989] 1 CLJ (Rep) 71 which has to be distinguished on the facts in the instant appeal). In the circumstances, the reasonable inference is that the appellant sustained the two injuries as a result of the said accident.

This court is of the view that the appellant had proved on a balance of probabilities the two injuries were as a result of the said accident. This court therefore awards a sum of RM10,000 for the fracture of olecranon injury and

a sum of RM12,000 for the avulsion fracture of lateral humeral epicondyle totalling to RM22,000 and after deducting 10% for overlapping, the award for the two injuries was RM19,800.

**Special Damages**

As for special damages being loss of earnings, the learned sessions court judge rejected the claim on the basis that there was no proof. This court is unable to confirm the decision for dismissing the claim for loss of earnings. Based on the unchallenged evidence of the appellant that he was a 'pembantu restaurant' the learned sessions court judge ought to have made some award for the loss of earnings. There is also unchallenged evidence that the appellant was earning RM700 per month and that he could not work for one year. Nevertheless, since there was no documentary evidence to support the actual amount of earnings, this court has allowed a sum of RM350 per month and his loss for one year as his employment and the period of his disablement was not challenged. The appellant is awarded the sum of RM4,200 towards his claim for loss of earnings.

**Loss Of Future Earnings**

As for loss of future earnings, there is evidence that the appellant has infact been earning a sum of RM530 per month after the one year from the date of the accident. Nevertheless, the appellant's counsel submitted that there is a reduction in his earnings at RM200 per month. He submitted that the appellant is entitled to RM200 per month for five years as loss of future earnings.

On the other hand, the respondent's counsel submitted that the appellant had failed to mitigate his losses by not returning to his former employment. He also submitted that the appellant did not plead this claim in the statement of claim and therefore he should not be awarded any loss of future earnings. Learned counsel for the respondent had referred to a specialist report dated 10 February 1995 given by Dr Tai Kim Teng, the Orthopaedic Specialist of the appellant's choice inter alia states that "he will then be more suited for sedentary work." He further argued that the appellant could still earn a living and therefore no award should be made for any loss of future earnings as submitted by the appellant's counsel.

Be that as it may, having considered the evidence of the appellant and the Specialist report of the appellant by Dr Tai Kim Teng as referred to by the respondent's counsel, this court is of the view that the appellant is not entitled to any loss of future earnings as claimed by the appellant as he was employed and continued to earn a sum of RM530 per month after the period of one year from the date of the accident. The period of five years as claimed by the appellant's counsel for loss of future earnings if allowed by this court would actually with respect condone the greed envisaged by the appellant as

if the appellant is entitled as of right for his loss of future earnings for so many fixed number of years. The period of 16 years multiplier is only the maximum period a claimant is entitled to claim for loss of future earnings and it is entirely at the discretion of the court to determine the number of years the plaintiff is entitled to loss of future earnings. This discretion will be based according to the facts of each individual case and does not come within the trend of the awards in previous cases referred to by the appellant's counsel as each case is decided on its own set of facts and not the general design.

This court wishes to reiterate what has been stated by this court in *Kanan Subramaniam & Satu Lagi v. Aman Syah Abadzyuid* [2002] 6 CLJ 34 at p. 46 that loss of future earnings is a claim under general damages and not special damages and it need not specifically be pleaded by a plaintiff in order to succeed in this claim. Nevertheless, this court is of the view and wish to reiterate that it would be desirable and practical if details of this claim is pleaded by a claimant to enable the defendant or the opponent to know in advance how much and what is the claim of the plaintiff. Also, the defendant would not be taken by surprise with this claim which will be only made known to him during the evidence-in-chief of the plaintiff or at a later stage and this could cause undue delay and difficulty for the defendant's solicitors to advise the insurance company with a view to facilitate an amicable settlement but of course this award will be subject to the determination of liability (see *Chan Wai Tong & Anor v. Li Ping Sum* [1985] 2 WLR 396 Privy Council wherein the Privy Council observed as per the headnotes "... it was good practice, as a general rule, for a claim for loss of future earnings to be specifically pleaded; that, although the failure to plead the claim for loss of future earnings, did not necessarily bar a plaintiff from recovery"). Following this observation, it does not mean that if the appellant did not plead details of his loss of future earnings, he will not be entitled to this claim as submitted by counsel for the respondent (see *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 MLJ 295 and *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 1 CLJ 301; [1984] 1 CLJ (Rep) 472).

On the other hand, if the claim and details of loss of future earnings is not pleaded, how will the defendant's counsel be able to challenge effectively the plaintiff during cross examination and this is likely to lead to injustice and prevent parties from engaging themselves in a fair contest and no doubt result in undue disadvantage to the defendant where he has to rely on the plaintiff's evidence during evidence in chief which no doubt will be the first time the defendant's counsel will have notice of this claim. In the circumstances, it will be in the interests of justice and better practice if the amount and the period for the alleged loss of future earnings is pleaded specifically so that

the defendant will have prior and early notice of how much and what is the plaintiff's claim so as to enable the defendant's solicitors to advise the insurance company of any possible settlement out-of-court.

**Liability**

**Appellate Court To Interfere If Lower Court Has Misdirected On The Evidence**

As for liability, the learned sessions court judge had erred in law and in fact in dismissing the plaintiff's claim where he said that there were no police photographs tendered to support the appellant's claim as to how the accident occurred. This is a clear case with respect of inattentiveness by the learned sessions court judge because the notes of evidence contained in the Record of Appeal shows that the police photographs were tendered through PW3 Sgt. Abdullah B Mohd Yusuf, the investigating officer and marked as exh. P3AJ which the learned sessions court judge had discarded when he dismissed the appellant's claim. This court is of the view that if the sessions court judge had taken this evidence, being the photographs into consideration and directed his mind judiciously, he would not have fallen into this grave error where he said in his grounds of judgment that "there are no photographs in respect of this investigation." In the circumstances, this court has no alternative but to intervene in this appeal and apportion liability on a 50:50 basis on the facts and circumstances in the instant appeal. See *Woon Ngee Yew & Others v. Ng Yoon Thai & Others* [1941] 10 MLJ (FMSR) 37 at 43 where His Lordship McElwaine, CJ (SS) by the majority judgment of the Court of Appeal said:

> An appellate Court should be very loath to differ on a finding of fact by a Court which has seen and heard the witnesses but *if the learned Judge can be shewn to have misdirected himself on the evidence, or to have rejected evidence for a wrong reason or to have drawn an inference from evidence which was equally capable of supporting a different inference it may be the duty of an appellate Court to interfere*. (emphasis added)

Accordingly, the appeal by the plaintiff against liability is allowed with costs, the finding of the learned sessions court which dismissed the plaintiff's claim with costs is set aside. Liability is apportioned equally between the appellant and the respondent on 50:50 basis. As to the appeal against quantum, the general damages is varied and the award is increased to include the award of RM19,800 for the two injuries. As to special damages, a sum of RM4,200 is awarded at RM350 per month for one year as loss of earnings. There is no award for loss of future earnings. Costs is agreed at RM2,500 for the appeal to be paid to the appellant's solicitors. The deposit paid is ordered to be returned to the appellant's solicitors.